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DESIGNING EFFECTIVE APPROACHES TO ELIMINATE THE USE OF COERCIVE ECONOMIC MEASURES AGAINST DEVELOPING COUNTRIES

Report prepared by

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Foreword

This report was prepared at the request of the UNCTAD secretariat. It reflects a request contained in General Assembly resolution 42/173 of 11 December 1987. The report was designed to promote discussions in a group of experts that UNCTAD convened from 1 to 3 May 1989. A report on that meeting has been reproduced as an annex to the report of the Secretary-General of the United Nations on the subject to the forty-fourth session of the General Assembly in document A/44/510.

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EXECUTIVE SUMMARY

1. Efforts to eliminate or limit the use of coercive economic measures against a broad range of developing countries raise several difficult questions. Fortunately, there appears to be room for constructive progress.

2. There is the problem of defining and identifying the coercive measures that should be eliminated or at least restricted. Developed and developing countries engage daily in a wide variety of international economic activity. The definitional process might best begin by categorizing the types of economic activity that, depending on the circumstances, could qualify as coercive measures. These activities can be roughly grouped into five major categories, as limits on:

(1) bilateral government programs, such as foreign assistance and aircraft landing rights;

(2) exports from the sender country;

(3) imports from the target country;

(4) private financial transactions, such as on bank deposits and loans for trade or investment;

(5) the activities of international financial institutions (IFIs), such as the World Bank.

There appear to be no activities that are per se, or automatically, wrong. Rather, Section 5 recommends certain tests.

3. Coercive economic measures can have an impact on the target developing country and on the development prospects of developing countries as as a whole.

Measuring the exact negative impact on the target country can be difficult. For present purposes, the best measure appears to be actual impact on the target country, regardless of the policy goal of the sender country. The actual impact can be assessed by examining a wide variety of data.

To facilitate measurement, simple analytical models can be used. The one devised by Hufbauer and Schott appears to be the best. Their model estimates the initial dollar cost of sanctions, and then uses a "sanctions multiplier" to estimate the longer term and more comprehensive "welfare loss" to the target country's economy.

Whatever the method for measurement, it is clear that economic sanctions have often had a seriously deleterious effect on individual target countries. There has been economic loss and

dislocation, and development efforts have been hampered.

Coercive economic measures also have a negative impact on the development prospects of developing countries as a whole. Beyond the cumulative impact of the sanctions against the individual target countries, there is the general harmful impact on the worldwide effort to move toward a nondiscriminatory, open trading system that produces important economic benefits for the world.

4. Although there have been considerable efforts to develop norms limiting the use of coercive economic measures, international law today lacks a clear consensus on when sanctions are improper. It also lacks adequate mechanisms both for monitoring the use of these sanctions and for taking action against their improper use.

A customary rule of international law has not developed regarding the use of coercive economic measures, despite U.N. declarations and resolutions and provisions in various treaties. The International Court of Justice essentially recognized this in its 1986 decision in the Nicaragua case.

While a number of international agreements contain general limitations on nonforcible intervention or specific limits on the use of coercive economic measures, the only two agreements that have some general relevance and applicability are the U.N. Charter and the GATT.

The U.N. Charter contains a mechanism for imposing sanctions against states (through Articles 39 and 41), but it does not contain any explicit rule limiting a state's nonforcible intervention against another state. Moreover, especially in recent years, the Security Council has had trouble mandating any action, usually because it is blocked by the veto of one of more of its five permanent members.

GATT provides a relatively well-developed framework for evaluating unilateral economic measures, and for taking action against improper discriminatory measures. The problem is that it does not cover many situations where coercive measures might be used, and its enforcement system needs to be improved and strengthened. GATT's difficulties in dealing with U.S. sanctions against Nicaragua--the cutoff of Nicaragua's sugar import quota in 1983 and then the comprehensive U.S. trade embargo in 1985--illustrate some of the problems in the GATT system.

5. How might real progress be made in the future? The first step is to continue to utilize GATT whenever possible. GATT is not only a functioning system, but it is also in the midst of major negotiations to expand its coverage of various economic activities and to improve its dispute resolution system.

These changes should be encouraged.

Beyond reliance on GATT, two threshhold substantive questions must be decided and certain institutional issues must be resolved. First, the criteria for distinguishing between acceptable economic activity and coercive economic measures need to be determined. It would seem that there should be a blanket prohibition on economic measures that possibly violate some general standard, with specific exceptions allowed. The prohibition should be on economic measures that discriminate against a country or group of countries and that are inconsistent with the U.N. Charter.

The economic activities that are potentially subject to this prohibition probably should only be negative economic activities, such as a trade embargo. Affirmative economic activities, such as where a country is offering a "carrot" like bilateral foreign aid, probably should not be included at this time. Although these activities can have an impact on the receiving country, favorable economic relationships between countries should be encouraged.

The exceptions that might be allowed to a blanket prohibition against negative economic activities that are discriminatory and contrary to the U.N. Charter start with the exceptions accepted by GATT. However, mere incorporation of the GATT exceptions is not adequate since those exceptions are often ambiguous. The exceptions need to be clarified in GATT and for cases beyond the scope of GATT.

International law recognizes that developing countries are entitled to differential treatment to assist their development. Nevertheless, it is not certain why a special rule needs to be devised to protect developing countries, as distinct from all countries, from coercive economic measures. If a special rule is considered helpful, then there is the problem of defining which countries are "developing countries" that can avail themselves of the rule.

Even assuming considerable progress in the Uruguay round, GATT will not have jurisdiction to deal with all coercive economic measures. GATT will presumably not be involved when the target country is not a GATT member, or in many cases dealing with export controls, financial controls, or bilateral government programs (e.g., landing rights or fishing rights).

These cases should not be left as orphans. The United Nations, through the General Assembly or Secretary-General, should designate an entity or entities to handle these cases, and define what can and should be done. In some situations, specialized agencies might play a major role when the sanction is in their area of expertise.

For the vast majority of non-GATT cases, however, the U.N. should designate one entity to be primarily responsible. This would ensure that there is some consistency of treatment.

Besides designating an entity, it must be determined what exactly the entity should be tasked to do. For even minimal progress toward eliminating coercive economic measures against developing countries, the entity Would be directed to investigate any questionable situation and to report its factual findings to the United Nations.

In addition, the entity should be directed to establish a panel or working group that assesses whether the questioned economic activities are objectionable under the substantive rules discussed above. The entity should also direct the panel or working group to make recommendations on what the sender country should do to stop its objectionable activities, and possibly recommendations on what relief the target country should be entitled to.

In sum, it first seems vital to build upon the existing GATT framework and to seek some improvements there. Moreover, it is necessary to develop a realistic norm of international law regarding the use of coercive economic measures, and then to designate an entity or entities that will seek to develop and apply that norm in cases not covered by GATT.

* * * * *

1. INTRODUCTION

Several developed countries have resorted increasingly in recent years to coercive economic measures against a broad range of developing countries. Recent examples include:

- -- financial and other sanctions by the United States against Panama;
- -- wide-ranging economic sanctions by the United States against Libya;
- -- the suspension of foreign assistance to Burma in 1988 by West Germany, Japan, and the United States;
- -- a trade embargo by the United States against Nicaragua;
- -- a reduction in planned economic assistance to Suriname by the Netherlands and the United States in 1982-84;
- -- anti-boycott laws by France, the Netherlands, and the United States against Arab League countries;
- -- a suspension of planned grants and loans to Turkey[1] by European Community countries in 1981-82; and
- -- a variety of economic sanctions by the European Community countries, Japan, Canada, and the United States against Iran after the seizure of U.S. hostages in 1979.

Considerable debate exists about the effectiveness of coercive economic measures. While the sanctions often do not contribute significantly to achieving the announced goals of the country imposing the sanctions, sometimes they do. More important for this study, even if the sanctions do not achieve their goals, the coercive measures usually have some negative impact, often serious, on the target countries. They can cause economic loss and dislocation, hamper development efforts, and interfere with international economic cooperation.

The limits on developed states employing coercive economic measures against developing countries are unclear under international law, although there has been considerable effort in the U.N. General Assembly to address this issue. There are no easy formulas. For example, some economic sanctions should be allowed--such as those authorized by the United Nations (e.g., against then Southern Rhodesia) or those required by valid national security considerations.

Defining limits on the use of economic sanctions is only part of the challenge. It is also necessary to consider how to determine whether the limits are being complied with. And, if

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[1] There is a question whether some of the Arab League countries or Turkey should be classified as a developing country. See discussion in Section 5.B.2.

there is noncompliance, there is the question of whether, and how, compliance might be enforced, or at least encouraged.

This report attempts to address the main issues in a systematic way. Section 2 seeks to define and identify coercive economic measures. Section 3 then addresses how to measure their impact on target countries and on the development prospects of developing countries as a whole. Section 4 discusses the present state of international law regarding the use of coercive measures against developing countries, and then it considers when measures should be allowed and when not. Section 5 analyzes the possible processes by which it should be determined whether a measure is allowable or not, and then what compliance or enforcement efforts might be appropriate. A suggested agenda for further discussion of the main issues is then provided at Appendix A.

2. DEFINING COERCIVE ECONOMIC MEASURES

Defining and identifying the coercive economic measures against developing countries that should be eliminated, or at least restricted, is difficult. Developed and developing countries--or individuals, corporations, or other entities within these countries--engage daily in a wide variety of international economic activity. They sell goods abroad, buy foreign goods, and move funds across borders. And individuals frequently travel abroad. The central definitional problem is to identify the particular economic activities that should be considered coercive measures against developing countries that should be eliminated or restricted.

While considering definitions, it is useful to recognize that a "coercive economic measure" is often referred to as an "economic sanction," and that these terms are often used interchangeably with "economic boycott" or "embargo."[2] The nation or nations that impose the sanctions are sometimes termed the sender(s), and the object or objects of sanctions are sometimes called the target(s).

The definitional process might best begin by categorizing the types of economic activity that, depending on the circumstances, could qualify as coercive measures. These activities, which encompass a wide variety of actions by a country, can roughly be grouped into five major categories, as limits on:

(1) bilateral government programs, such as foreign

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[2] It is possible to develop a more careful classification of these and related terms. See A/40/596 (1985), paras. 16-17. Such an approach, however, does not seem necessary for present purposes.

assistance, low-interest credit, loan guarantees, special insurance programs, fishing rights, port access, aircraft landing rights, travel advisories, and use of passports;[3]

(2) exports from the sender country;

(3) imports from the target country;

(4) private financial transactions, such as on bank deposits, loans related to trade, and loans for investment or other purposes; and

(5) the activities of international financial institutions (IFIs), such as the International Monetary Fund (IMF), the World Bank, and the regional development banks.[4]

There are miscellaneous economic measures that do not easily fall into any of these five principal categories. Such miscellaneous measures include limits on foreign tax credits. Other measures fall into this miscellaneous category because they span several types of economic activity. For example, the anti-boycott laws in the United States and other countries limit a variety of business relationships--exports, imports, bank financing, and foreign investment--that a business entity can have with foreign entities that seek to further a prohibited boycott.[5]

Yet what is it that leads the particular economic activities in one of these categories to become coercive measures that

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[3] This list includes a wide assortment of programs that have the common strain of depending on funding by the sender government, or at least on some critical government approval. Conceivably, some of these programs, such as travel advisories and passports, could be put in the miscellaneous category discussed later.

[4] A country can try to influence the activities of an international financial institution against another country by its formal votes on loan requests or by lobbying other member countries and the institution's staff.

[5] The categories of economic activities listed earlier fall somewhere in the middle of the spectrum of possible actions that a country might take to coerce, directly or indirectly, a developing country. The most coercive steps--and these are not economic ones--are the use of military force, covert actions, and the threat to use force. Generally less coercive are such diplomatic measures as expulsion of some of the target country's diplomatic personnel, recall of the ambassador, a formal diplomatic protest, and suspension of cultural exchanges.

Note that the operative U.N. resolution (42/173) focuses on "economic measures as a means of political and economic coercion," and not "economic and political measures."

should be restricted or eliminated. While some commentators have suggested that certain economic activities are more suspect than others,[6] there appear to be no activities which are per se, or automatically, wrong. Rather, as discussed later in Section 5, the best tests appear to be that the activities discriminate against a country or group of countries and that they are inconsistent with the provisions of the U.N. Charter.[7]

3. THE IMPACT OF ECONOMIC SANCTIONS

Coercive economic measures can have an impact on (A) the sender country, (B) on the target developing country, and (C) on the development prospects of developing countries as a whole. The type and amount of impact depend, of course, on the situation and the type of sanctions imposed.

A. Impact on the sender country. There is no need here to consider the impact on the sender country since it is that country which has made the decision to impose the sanctions.[8]

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6 See A/41/739, para. 15, UNCTAD contribution.

7 See Section 5.B.1 infra. That section also notes the distinction between affirmative economic activities (such as providing bilateral foreign aid) and negative activities (such as a trade embargo), and concludes that it would be inadvisable to try to classify affirmative activities as coercive economic measures.

8 It is helpful to note, however, that myriad costs might be involved. Many stem from the indirect effects of sanctions, such as the loss of sales by a supplier when the manufacturer is prevented from making an export sale to a target country. Other costs result from long-term changes in business patterns, which often occur when the target country seeks to minimize the financial effects of future sanctions. For example, Arab countries and individuals reduced their deposits in U.S. banks to avoid having assets frozen by future sanctions after the United States froze Iranian assets in 1979.

These domestic costs of sanctions are rarely calculated in any detail or with much reliability. The cost calculations might not be important to the policy-maker in the sender country, particularly when a large, developed country (such as the United States) is imposing coercive measures against a developing country with a much smaller economy (such as Nicaragua). Moreover, there may be considerable incentives for the government not to calculate domestic costs. Careful estimates might highlight those costs and exacerbate the government's political problems with domestic constituencies hurt by the sanctions, such as farmers faced with export controls.

Moreover, that country is usually a developed country which falls outside the focus of this report.

B. Impact on the target country. Coercive economic measures clearly can have a negative impact on the target country. Indeed, that is usually their purpose. If the sanctions were to have no impact on the target country, it would serve little purpose for the sender country to impose them.[9]

Measuring the full and exact impact on the target country can be difficult, however. Many analyses of impact measure the contribution of the economic sanctions to the desired policy outcome of the sender country. Such analyses ask essentially two questions: to what extent the outcome sought by the sender country was achieved, and to what extent the sanctions contributed to this outcome.[10]

Disregarding the policy goal of the sender country for the present, the relevant question here is the actual impact of the

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For further discussion of the costs of sanctions to the sender country, see G. Hufbauer and J. Schott, Economic Sanctions Reconsidered: History and Current Policy 64-69 (1985: Institute for International Economics).

[9] An occasional exception might be when the sender country is trying symbolically to express its opposition to the target country's policies to various people in the sender country or or in third countries. The actual impact on the target country is not vital then, although even the symbolic significance of the sanction would usually be reduced by its apparent ineffectiveness. An example of primarily symbolic measures would be the very mild U.S. sanctions against Argentina in 1982 during the Argentine-British war over the Falkland (Malvinas) Islands. The economic sanctions seemed primarily designed to help signal U.S. support for the British.

[10] Probably the best empirical analysis of economic sanctions is the major study by G. Hufbauer and J. Schott, supra note 8. Their study includes evaluations of the success of various sanctions episodes based on this two-part analysis. (Id. at 32-33.) Their study also includes other analytical approaches, as discussed in the next three pages of this report.

Other empirical studies that examine the success of coercive economic measures from the standpoint of the sender country include M. Doxey, International Sanctions in Contemporary Perspective (1987: St. Martin's Press); D. Losman, International Economic Sanctions: The Cases of Cuba, Israel, and Rhodesia (1979: Univ. of New Mexico Press); R. Renwick, Economic Sanctions (1981: Harvard Center for International Affairs).

coercive economic measures on the target country. The issue for this inquiry is how sanctions harm the developing country. Even with this specific focus, measuring the full and exact effect of the economic measures is difficult, given the wide variety of possible sanctions and the many direct and indirect impacts that they might have on a developing country.

As a result, any comprehensive analysis of the impact of sanctions on a target country needs to take into account a wide variety of data. In part, it must necessarily be an exhaustive "laundry list" of effects and it must necessarily include much that is anecdotal.

Although economic models have their limitations in these situations, some use of models is possible. In their excellent empirical study on sanctions, Hufbauer and Schott have developed probably the best model for estimating the cost of sanctions on the target country. It is a simple analytical model, reflecting the limitations of the data, the complexity of the issues, and the need to provide results. As Hufbauer and Schott summarize their model:

> In order to calculate the cost of each sanctions episode to the target country, we have estimated the initial deprivation of markets, supplies, or finance, expressed on an annualized basis in current U.S. dollars. To calculate the 'welfare loss' to the target's economy, we then used our own judgment to estimate the 'sanctions multiplier' that should be applied in the context of the particular episode. Some types of sanctions affect the target country more than others for a given amount of trade or finance. The welfare loss caused by reductions in aid may be 100 percent of the value of the aid; on the other hand, trade controls may cause less harm than the value of the shipments affected because of the availability of other markets or substitution for other goods."[11]

A more complete discussion of the Hufbauer-Schott model is contained in the excerpt from their book, attached here as Appendix B.

Their model does take into account the fact that the "impact of sanctions on the target country may be partially or totally offset by the helping hand of another major power."[12] This report, however, does not consider such offsetting assistance, on the theory that we want an estimate of the full cost of sanctions. A target country that manages to obtain offsetting

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11 Hufbauer and Schott, supra note 8 at 60-61.

12 Id. at 61.

assistance might be paying a price for it in terms of reduced independence in one subtle way or another. Accordingly, any references to the Hufbauer-Schott calculations do not include their estimates of offsetting benefits from new third-country assistance.

The actual cost estimates reached by the Hufbauer-Schott model demonstrate that the costs imposed on developing countries by coercive economic measures can be substantial. This depends in part on the particular circumstances. Sanctions that have an immediate impact or are against a country that is much smaller than the sender country are usually the most effective. Moreover, a government that is already plagued by significant economic problems and political turmoil is more easily destabilized than other governments.[13]

Examples of sanctions that proved burdensome on the target country include the reduction in planned economic assistance to Suriname by the Netherlands and the United States from December 1982 through 1984. The model estimates that the annual cost of this sanction was about $100 million, or approximately 9.7% of Suriname's Gross National Product (GNP).[14]

Similarly, restrictions on imports from and exports to Uganda by the United Kingdom and the United States in 1977-79 are estimated to have cost Uganda about $36 million per year, or 2.6% of its GNP.[15]

The comprehensive U.S. trade embargo and other economic sanctions against Cuba which started in 1960 and continue through the present have had a substantial, adverse effect on the Cuban economy. Hufbauer and Schott estimate the cost during at least 1960-67 as about $366 million per year, or about 14% of Cuba's 1960 GNP.[16]

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13 Id. at 86, 83, 44.

14 Id. at 728. Note that Hufbauer and Schott also estimated that Suriname received offsetting benefits from Cuba and Brazil of over $16 million, thus reducing the impact on Suriname to 8.2% of its GNP.

15 Id. at 458.

16 Using their offsetting approach, they value assistance from the Soviet Union at $252 million per year, reducing the impact of the sanctions to $114 million, or 4.4% of the Cuban GNP. Id. at 320-21. Besides the data cited in the Hufbauer-Schott book to demonstrate the adverse effect of the U.S. sanctions, other materials also demonstrate the impact. For example, see Cuba's May 1985 report to the U.N. Secretary General

A final example is the 1970-73 sanctions against the Allende Government in Chile, which included unilateral measures by the United States and also reductions in assistance from the World Bank and the Inter-American Development Bank. Hufbauer and Schott estimate the annual costs at $163 million, or 1.5% of the Chilean GNP.[17]

For the impact of sanctions from 1985 to the present, we need to fall back to the laundry list of effects and to anecdotal information, as discussed earlier. (The Hufbauer-Schott book was published in 1985 and appears to be based on data collected through mid-1984.) Nevertheless, it is clear that coercive economic measures against developing countries continue to hurt the target countries. The sanctions against Panama and Nicaragua are good examples.

Panama has suffered serious economic hardship as a result of U.S. financial sanctions imposed in March-April 1988. There was a flight of capital from banks in Panama and the domestic economy took a sharp dive. The U.S. Department of Commerce has estimated that Panama's gross domestic product tumbled by 20% last year, and other estimates by foreign and local economists range up to 40%.[18]

Nicaragua's economy has also encountered severe difficulties in the last few years. For example, the chief Nicaraguan economic planner said last October that "Industrial production has dropped off sharply, and commerce is falling apart. . . . In foreign trade, there is a serious gap between imports and exports." The planner estimated that industries would produce 35% less in 1988 than in 1987, and that export earnings would only cover one-fourth of the cost of vital imports.[19]

There is considerable debate, however, over the relative importance of the causes of Nicaragua's difficulties. The U.S. sanctions--the cutoff of sugar imports from Nicaragua in 1983, followed by the imposition of a comprehensive trade embargo in 1985--have surely had some effect. Although U.S. goods and spare

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in A/40/596 (1985), at 24-41.

17 Hufbauer and Schott, supra note 8 at 443.

18 New York Times, Feb. 11, 1989, at 4, col. 1. See also Report of the third Biennial Meeting of the Heads of National Agencies for Technical Cooperation of the Group of 77 (G.77/TCDCIII/1988/RPT.Rev.), Annex IX.

19 S. Kinzer, "Nicaragua's Economic Crisis Is Seen As Worsening," New York Times, Oct. 16, 1988, at 1, col. 1.

parts can still be obtained in Nicaragua, they cost more because they must be imported through third countries. Nicaraguan goods that were once exported to the United States must now find other markets or be shipped to the United States through third countries.[20] Nevertheless, other causes have certainly had an adverse impact on Nicaragua.[21]

C. Impact on development prospects as a whole. Coercive economic measures against individual developing countries also have an impact on the development prospects of developing countries as a whole. This impact would seem to include two components.

First, there is the cumulative, or total, impact of the sanctions against the individual target countries. This can be estimated by adding up the adverse impact against Panama, Nicaragua, and the other targets.[22]

Second, there is the general harmful impact on the worldwide effort since World War II to move toward a nondiscriminatory, open trading system that produces important economic benefits for the world. Although this impact is particularly hard to estimate, it is real. For example, at the General Agreement on Tariffs and Trade (GATT), concern has mounted that unilateral economic measures by one country or another will thwart progress

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20 New York Times, Jan. 12, 1989, at A14, col. 1.

21 See, e.g., New York Times, Oct. 16, 1988, at 1, col. 1.

22 To be more accurate, some account might be made for new purchases from, or other economic benefits to, other developing countries as a result of sanctions against a target country. For example, the U.S. cutoff of sugar purchases from Nicaragua hurt Nicaragua, but other developing countries (e.g., El Salvador and Honduras) received some benefit when the United States increased its sugar purchases from them.

These offsetting benefits do not add up to anything approaching the costs of the sanctions. To begin with, many of the adverse effects in the target country are simply not offset elsewhere--e.g., the severe shock and dislocation to banks in Panama as a result of the U.S. financial sanctions. Moreover, even when there are some offsetting benefits elsewhere, they often do not have the same magnitude as the costs to the target country. For example, the reduction in planned economic assistance to Suriname by the Netherlands and the United States from 1982-84 might have led the two developed countries to provide more assistance elsewhere, but the beneficial effect was presumably more diffuse than the sharp impact of a sudden cutback in economic assistance to Suriname.

in the Uruguay Round of negotiations and hamper economic growth in general.[23]

4. PRESENT STATE OF INTERNATIONAL LAW

Although there have been considerable efforts to develop norms limiting the use of coercive economic measures, international law today lacks a clear consensus on when sanctions are improper. It also lacks adequate mechanisms both for monitoring the use of these sanctions and for taking action against their improper use. The two partial exceptions to this situation are sanctions imposed by the international community (United Nations) or by GATT.[24]

The analysis here can usefully look to both customary international law and to international agreements, which are the two major potential sources of international law in the area of coercive economic measures.[25]

A. Customary international law. Customary international law results from a general and consistent practice of states, followed from a sense of legal obligation. Evidence that a rule has been accepted as international law can be found in the practice of states, judgments by international judicial and

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23 There was a sharp debate on this matter at the meeting of the GATT Council on February 8, 1989. BNA, 6 International Trade Reporter, Feb. 15, 1989, at 194.

24 E.g., see A/42/660, at para. 23 (1987).

25 This report does not consider the national laws of various states since the focus is on international law. For a comprehensive analysis of U.S. domestic laws for the imposition of sanctions and an overview of the laws of the United Kingdom, Federal Republic of Germany, Japan, and the European Community, see B. Carter, International Economic Sanctions (1988: Cambridge Univ. Press).

That book concludes that the haphazard U.S. statutes provide the President with nearly unfettered authority to impose sanctions in some areas, such as cutting off bilateral government programs or exports, but very little authority in other areas, such as regulating imports or private financial transactions, unless there is a declared national emergency. If there is such an emergency, the President's powers are sweeping. In comparison, the Chief Executives in the United Kingdom, Germany, and Japan have regular, broad authority to control imports and private financial transactions as well as exports.

See also J. Jackson, J.-V. Louis, and M. Matsushita, Implementing the Toyko Round (1984: Univ. of Michigan Press).

arbitral tribunals, judgments and opinions of national judicial tribunals, the writing of scholars, and pronouncements by states.[26]

A customary rule of international law has apparently not developed regarding the use of coercive economic measures. As one recent, insightful article concluded:

> Target state responses to negative economic leverage frequently invoke various norms of international law, including the norm against nonintervention in internal affairs. Often these responses have been part of broader claims made in the context of the North-South dialogue--for example, that developed states have a legal duty to maintain aid flows without the imposition of any political conditions, or even that economic 'coercion' to achieve political objectives constitutes a use of 'force' barred by the UN Charter. These broad claims have been rejected by developed countries and thus cannot be said to have produced any new normative consensus. Nor does there seem to be any disposition on the part of influencing states to accept more narrowly formulated claims that they are legally bound by the nonintervention norm to refrain from resorting to economic pressure to affect political developments in another state.[27]

As the article noted, many states have tried--through formal treaties and through declarations and resolutions of international organizations--to establish a rule against nonforcible intervention in the affairs of another state.

For example, Latin American countries have often taken the lead here. An early example is Article 8 of the 1933 Montevideo Convention on the Rights and Duties of States, which provides: "No state has the right to intervene in the internal or external

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26 E.g., I. Brownlie, Principles of Public International Law 4-15 (1979: Oxford Univ. Press).

27 L.F. Damrosch, "Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs," 83 Am. J. Int'l L. 1, 32 (1989)(footnote omitted). The rest of this section draws on Prof. Damrosch's analysis and that of O. Elagab, The Legality of Non-Forcible Counter-Measures in International Law (1988: Clarendon Press, Oxford). See also A/42/660, at 5-9 (1987); A/41/739, at 6-9 (1986); M. Doxey, supra note 10; I. Shihata, "Destination Embargo of Arab Oil: Its Legality Under International Law," 68 Am. J. Int'l L. 591 (1974).

affairs of another."[28] Moreover, Article 19 of the Charter of the Organization of American States (OAS) reads: "No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind."[29]

The U.N. General Assembly has passed a number of declarations and resolutions that generally condemn interference in the sovereign affairs of any state by another state, or that more specifically condemn the use of coercive economic measures to influence a country's internal affairs. The earliest example is apparently the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty. It proclaimed that "No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind."[30]

Such U.N. declarations and resolutions, however, only constitute evidence of customary international law, and even then their weight depends on whether they were controversial and whether they were adopted by consensus or virtual unanimity.[31] In fact, the number of countries opposing these resolutions has gradually increased. For example, G.A. Resolution 42/173 was adopted in December 1987 by a recorded vote of 128 states for, but 21 against.[32]

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28 The Convention has been ratified by 16 Western Hemisphere countries (including the United States). T.S. No. 881, 165 L.N.T.S. 19 (1933).

29 2 U.S.T. 2394, T.I.A.S. No. 2361 (1948).

30 G.A. Res. 2131, 20 U.N. GAOR, Supp. 14 (A/6014), at 11 (Dec. 21, 1965) (adopted without dissent, with one abstention). See also G.A. Res. 2565 (XXV), para. 2 (Oct. 24, 1970) (adopted without vote) and later resolutions cited in A/42/660, at 7-8 (1987).

31 E.g., O. Schachter, "International Law in Theory and Practice," 178 Recueil des Cours 111-21 (1982).

32 The Resolution was "[r]eaffirming . . . that no State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights." It also called upon "the international community to adopt urgent and effective measures in order to eliminate the use of coercive measures against developing countries . . . ."

Two recent agreements should also be noted. The Algiers Accords of 1981, which ended the hostage crisis between Iran and the United States, included a U.S. pledge "not to intervene, directly or indirectly, politically or militarily, in Iran's internal affairs."[33] And the Afghanistan agreements signed in April 1988 by Afghanistan and Pakistan, and guaranteed by the Soviet Union and the United States, "contain more than a dozen references to the principles of noninterference and nonintervention in internal affairs, including elaborate undertaking to refrain from nonforcible as well as forcible intervention."[34]

In spite of efforts like these to establish bilateral or international rules against nonforcible intervention in the domestic affairs of another state, it is generally conceded that such a customary rule of international law does not exist.[35] Very instructive is Nicaragua's case against the United States in the International Court of Justice. Nicaragua asserted that the United States had violated the principle of nonintervention with its cutoff of economic aid, its 90% reduction of the sugar quota for Nicaragua, and then its comprehensive trade embargo. Although the ICJ ruled in 1986 that the United States violated customary international law by training and arming the contras, the majority opinion nevertheless concluded (without much explanation) regarding the economic sanctions, "[T]he Court has merely to say that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention."[36]

B. International agreements. While a number of international agreements contain general limitations on nonforcible intervention or specific limits on the use of coercive economic measures, the two agreements that have some general relevance and applicability are the U.N. Charter and the GATT.

Other international agreements are confined in their

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33 20 Int'l L. Mat. 223, 224 (1981).

34 Damrosch, supra note 26 at 12 (footnotes omitted).

35 See discussion above, including the sources cited at note 26. Even if one were to argue that some variant of the rule against nonforcible intervention existed, there is still the difficult task of defining just what specific activities are prohibited. What exactly constitutes, for instance, "intervention in the internal (or domestic) affairs of another state"?

36 1985 I.C.J. 14, 126.

coverage to only two or a few states, or their provisions are vague, or effective enforcement mechanisms are lacking. As a result, although the provisions of these other agreements might constitute some evidence of customary international law, they do not provide much basis in the foreseeable future for limiting the use of coercive economic measures against developing countries.

1. U.N. Charter. The U.N. Charter is especially significant for establishing a mechanism for collectively imposing sanctions against a country. Article 39 of the Charter provides that:

> The Security Council shall determine the existence of any threat to the peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 41 then provides that:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. They may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.[37]

These Articles give the Security Council broad powers to impose economic sanctions. However, especially in recent decades, the Security Council has had trouble mandating any action, usually because it has been hamstrung by the veto of one or more of its five permanent members.

The Security Council has been able to call for economic sanctions in the cases of Southern Rhodesia and South Africa. As for Southern Rhodesia, in December 1966, the Security Council passed resolution 232 calling for selective mandatory sanctions. That was followed by resolution 253 in 1968 calling for comprehensive sanctions.[38] When an arrangement was reached for majority rule in Southern Rhodesia, soon to be called Zimbabwe, the United Nations ended its call for sanctions in December 1979.

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[37] Article 42 provides for the use of military forces if the measures authorized under Article 41 are inadequate.

[38] UN Doc. S/RES/232, 21(2) UN SCOR Supp. at 7-9 (1966); UN Doc. S/RES/253, 23 UN SCOR at 5-7 (1968).

South Africa's apartheid policy and aggressive acts led the Security Council in 1977 to call for an embargo on shipments of arms, munitions, and military equipment to or from that country.[39] Although these sanctions have been tightened over the years, even more comprehensive sanctions have been vetoed.[40]

Although the U.N. Charter creates a mechanism for imposing sanctions against states, it does not contain any explicit rule limiting a state's nonforcible intervention against another state. It does have several provisions that implicitly reflect the right of states to be free from intervention. For example, articles 1(2) and 55 express respect for "the principle of equal rights and self-determination of peoples" and article 2(4) provides that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." However, such implicit recognition of a rule against nonforcible intervention, as expanded upon in the U.N. declarations and resolutions discussed above, does not create a treaty commitment for Member States. Rather, they are evidence of customary international law.

2. The General Agreement on Tariffs and Trade (GATT). GATT provides a relatively well-developed framework for evaluating unilateral economic measures, and for taking action against improper discriminatory measures. The problem is that it does not cover many situations where coercive measures might be used, and its enforcement system needs to be improved and strengthened.[41]

Central to GATT is the principle of nondiscrimination among nations in trade relationships. The most significant GATT provisions are the most favored nation (MFN) treatment obligation in article I and the ban on quantitative restrictions in article XI.

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[39] S.C. Res. 418, 32 UN SCOR at 5, UN Doc. S/RES/418, S/INF/33 (1977). This followed an earlier call for a voluntary arms embargo. S.C. Res. 181, 18 UN SCOR at 7, UN Doc. S/RES/181, S/INF/18/Rev. 1 (1963).

[40] Later Security Council Resolutions include S.C. Res. 569 of July 1985. Great Britain and the United States vetoed in February 1987 a resolution that would have imposed further mandatory sanctions against South Africa. New York Times, Feb. 21, 1987, at 3, col. 1.

[41] See generally B. Carter, supra note 25, at 95-97, 131-40; J. Jackson, World Trade Law and the Law of GATT (1969); R. Hudec, The GATT Legal System and World Trade Diplomacy (1975).

Unfortunately, for purposes of limiting coercive economic measures against developing countries, GATT at most provides only part of the solution. First, some of the present target countries are not contracting parties[42] to GATT. For example, Panama, Libya, and Iran are not members.

Second, GATT primarily covers import controls and government programs (e.g., subsidies) that influence the price of imports. Although there are efforts to expand the coverage of GATT, such as in the ongoing Uruguay round of negotiations, GATT's coverage of export controls,[43] financial controls, and bilateral government programs is spotty.

Third, even regarding import controls (or export controls where the General Agreement might be applicable), GATT's present framework allows broad exceptions to the GATT rules, so that what would otherwise be coercive economic measures can be justified. These exceptions include those in articles XXI and XXV, and what might be termed "tacit exceptions." These exceptions, or justifications, need also be viewed in the context of problems encountered with GATT's dispute settlement process, which is sometimes slow and often offers inadequate relief.

a. GATT exceptions. The security exceptions of article XXI are broad. They include actions that a country "considers necessary for the protection of its essential security interests" relating to fissionable materials, arms or other goods that will help supply a military establishment, or wartime or international emergency. (See text in Appendix C.)

Article XXI was first claimed to justify economic sanctions for foreign policy purposes in response to Czechoslavakia's challenge to the U.S. export licensing program in 1949. Czechoslavakia argued that the program violated the MFN obligation in article I. The Contracting Parties decisively voted against the challenge. Between 1949-82, apparently only two cases arose formally in GATT in which the imposing country relied on article XXI. This paucity of cases could well reflect the lack of a requirement in article XXI for the country imposing the sanctions to report its reliance on this exception, as well the recognition by target countries that a contracting party is allowed to define its own "essential security" exceptions.

In 1982 article XXI was raised specifically in discussions

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42 The capitalized term "Contracting Parties" is used in this article to refer to the parties to the GATT acting formally as a body. Otherwise, the references to individual or several contracting parties, or members, are lower case.

43 See Carter, supra note 25 at 95-97.

of the suspension of imports from Argentina by the United Kingdom, the European Community, Australia, and Canada during the Falklands (Malvinas) conflict. Partly as a result of the debate over this case, the GATT Contracting Parties at their annual meeting in November 1982 adopted a decision that increased the procedural requirements for invoking article XXI. As a result, a party now invoking the article is required to inform the other members "to the fullest extent possible of trade measures taken under Article XXI." Also, the target country retains its full rights under the General Agreement, including recourse to the dispute resolution procedures. Further, the Contracting Parties adopted a Ministerial Declaration whereby they undertook "to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement."[44]

Most recently, the United States cited article XXI to justify a trade embargo against Nicaragua in May 1985. At a GATT Council meeting that month, the U.S. delegate said that the United States "sees no basis for GATT contracting parties to question, approve, or disapprove the judgment of each contracting party as to what is necessary to protect its national security interests." The United States met with considerable criticism at the meeting.[45]

A GATT panel was established to investigate the matter. The panel's terms of reference, which the United States insisted upon, explicitly provided that the panel could not examine or judge the validity of, or the motivation for, the U.S. use of article XXI:(b)(3). (This is the clause that refers to actions "taken in time of war or other emergency in international relations.")

The panel reported to the Council in October 1986. It concluded that "as it was not authorized to examine the justification for the US invocation of a general exception to the obligations under the General Agreement, it could find the United States neither to be complying with its obligations under the General Agreement nor to be failing to carry out its obligations under that Agreement." The panel did go on to note that "embargoes such as the one imposed by the United States, independent of whether or not they were justified under Article XXI, ran counter to the basic aims of the GATT." The panel also recommended that, in further consideration of the issue, the Council should take into account the following questions:

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44 GATT Doc. L/5426 (1982); GATT Doc. SR.38/10, at 2-3 (1982); see A/42/660, at para. 29 (re: Ministerial Declaration).

45 BNA, 2 Int'l Trade Reporter, June 5, 1985, at 765.

> If it were accepted that the interpretation of Article XXI was reserved entirely to the contracting party invoking it, how could the Contracting Parties ensure that this general exception to all obligations under the General Agreement is not invoked excessively or for purposes other than those set out in the provision? If the Contracting Parties give a panel the task of examining a case involving an Article XXI invocation without authorizing it to examine the justification of that invocation, do they limit the adversely affected contracting party's right to have its complaint investigated in accordance with Article XXIII:2? Are the powers of the Contracting Parties under Article XXIII:2 sufficient to provide redress to contracting parties subjected to a two-way embargo?

The United States took the position that the Council should adopt the panel's report (which was unable to find a violation of the General Agreement) and decline to consider the panel's questions. Nicaragua asked for further consideration of the article XXI questions and other matters. As of the end of 1988, GATT had yet to take further action on the panel report.[46]

Another possible ground for justifying economic sanctions is paragraph 5 of article XXV. It allows the Contracting Parties in "exceptional circumstances not elsewhere provided in this Agreement" to "waive an obligation" imposed on an individual contracting party. This waiver requires a two-thirds vote of those voting. Neither the contracting party nor GATT has always specified the basis for some actions that might fall under this waiver. However, article XXV was possibly the basis for the Contracting Parties' approval of the U.S. suspension of MFN status to Czechoslovakia in 1952.[47]

A third ground is a "tacit exception," where GATT identifies no specific exception, but a situation is allowed to continue because it involves broader political questions. The United States made an explicit claim for a tacit exception to justify its cutoff of Nicaragua's sugar import quota in 1983. The panel that investigated the matter rejected the claim. It concluded that the U.S. action was not consistent with the obligations of nondiscrimination set forth in article XIII:2 and noted that the United States had not claimed any specific GATT exception. The

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46 See GATT, GATT Activities 1986, at 58-9 (1987); GATT, Gatt Activities 1987, at 69-70 (1988).

47 Jackson, supra note 41, at 750. However, some contracting parties did not wish to utilize the waiver authority. As a result, as discussed next, the case could also be considered a "tacit exception" under GATT. Id.

GATT Council adopted the panel's report in March 1984.[48]

b. GATT dispute resolution. The effectiveness of any complaints in GATT against import (or export) sanctions is considerably affected by the GATT dispute resolution machinery--which is complicated, sometimes cumbersome, and sometimes inadequate.[49] Improvements in the machinery are one of the important issues in the ongoing Uruguay round.

The GATT articles contain more than thirty provisions regulating dispute settlement procedures. Central to the process, especially for complaints about coercive economic sanctions, are articles XXII and XXIII. (The text of these articles is at Appendix C.) Article XXII provides for consultation between parties "with respect to any matter affecting the operation of this Agreement." Article XXIII provides for mediation by the Contracting Parties and, if they authorize it, retaliation by the affected party by suspending "concessions or other obligations" under the General Agreement as may "be appropriate in the circumstances."

In practice, only one dispute has resulted in suspension of concessions under article XXIII--a complaint by the Netherlands against the United States in the 1950s. There has never been a suspension of "other obligations." Nevertheless, Professor Jackson notes that "the language of . . . article [XXIII] is broad and sweeping. The language itself is not limited just to 'compensating' redress but is broad enough to be used as the basis for serious sanctions. For instance, all concessions of all other contracting parties could be suspended vis-a-vis a notoriously offending contracting party--in effect, driving it out of GATT--if the CONTRACTING PARTIES determined this to be 'appropriate.' Likewise, lesser penalties, but still stronger than compensating redress, could be authorized for application by

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48 GATT, Gatt Activities in 1984, at 39 (1985); GATT Doc. L/5607, at 5-7 (1984). The U.S. decision not to cite a GATT article in 1983 seems inconsistent with its citation of article XXI in 1985 to justify the broader trade embargo against Nicaragua. Although it was probably easier to fit the embargo under article XXI because of the accompanying U.S. declaration of a national emergency, the underlying reasons for the 1983 and 1985 actions were much the same. Possibly, the panel report in the sugar case taught the United States that there was no benefit in failing to cite a specific exception as justification.

49 See generally U.S. International Trade Commission, Review of the Effectiveness of Trade Dispute Settlement Under the GATT and the Tokyo Round Agreements (1985: ITC); J. Jackson, "Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT," 13 J. World Trade Law 1 (1979).

groups of contracting parties."[50]

The GATT procedures were reassessed in the late 1970s during the Tokyo round of negotiations. In 1979, the Contracting Parties adopted an understanding which helped standardize dispute settlement and which formally recognized the use of panels.[51] The procedures have been further examined during the Uruguay round. While these negotiations are still ongoing, the trade ministers did reach a tentative agreement in December 1988 on new rules for improving the dispute settlement procedures. The improvements will be applied on a trial basis from January 1989 to the end of the Uruguay round.

These improvements include, among other matters, further standarization of the procedures for panels and working parties. To help avoid problems, such as the long delays in handling Nicaragua's complaint against the U.S. trade embargo, the period from a country's initial request under article XXII:1 or article XXIII:1 until the time that the Council takes a decision on the panel report "shall not, unless agreed to by the parties, exceed fifteen months." Moreover, "[i]n no case should the period from the establishment of the panel to the submission of the report to the contracting parties exceed nine months." As "a general rule," this latter period should not exceed six months. The improvements also explicitly recognize arbitration as an alternative means of dispute settlement.[52]

The improvements, however, did not eliminate the requirement for a consensus of the contracting parties in the drafting of the terms of reference of the panel, or in adopting panel reports. As a result, one country still has an ability to block the dispute resolution process, if it is willing to withstand pressures from the other contracting parties. Nevertheless, the clear thrust of the improvements is to encourage a speeding up of the process in many cases.

For a target country, an even greater problem than the procedural obstacles is the relief available under GATT. As noted above, the Contracting Parties are likely at most to authorize the injured party under article XXIII to suspend the concessions it has granted the other country or suspend other obligations owed that country. This relief is limited, particularly when the country imposing the sanctions is willing

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50 Jackson, supra note 47, at 186-7; see id. at 181-5.

51 Understanding Regarding Notification, Consultation, Dispute Settlement, and Surveillance, 26 BISD 210 (1980).

52 GATT, MTN.TNC/7(MIN), Dec. 9, 1988, Dispute Settlement provisions, sections E-G.

to absorb some costs to carry out its foreign policy.

The situation is especially unsatisfactory when the target country is much smaller than the country imposing the sanctions, because the small country's retaliation is unlikely to have any significant effect on the large country. For example, even if Nicaragua had been authorized to suspend offsetting concessions to the United States after the U.S. cutoff of its sugar quota, this retaliation would have had an infinitesimal impact. Indeed, the United States itself later decided to cut off exports to, as well as imports from, Nicaragua.

In sum, although the scope of GATT's coverage is limited and there still remain problems with its dispute resolution machinery and the relief available, GATT does have a functioning system for addressing some of the possible cases of coercive economic measures.

5. LOOKING TO THE FUTURE

In spite of the considerable efforts to develop international rules eliminating or limiting the use of coercive economic measures against developing countries, much obviously remains to be accomplished. How best might real progress be made?

Based on the analysis above and also for the reasons below, this report recommends that the first step is to continue to utilize GATT wherever possible. GATT is not only a functioning system, but it is also in the midst of major negotiations to expand its coverage of various economic activities and to improve its processes. Beyond reliance on GATT, two threshhold substantive questions must be decided and certain institutional issues must be resolved.

The two substantive questions are: (1) What should be the criteria or bases for distinguishing between acceptable economic activity and coercive economic measures? (2) Should this distinction be the same for economic measures against all countries, or should there be a special rule to protect developing countries?

The institutional issues revolve around what entity or entities should be responsible for dealing with coercive economic measures against developing countries that fall outside the scope of GATT? In other words, who should have jurisdiction when GATT does not. And what should that entity's role and powers be? Should it simply monitor and report? Should it have some enforcement powers?

A. Looking to GATT. As discussed above, GATT is operating

in the area of import controls and sometimes export controls, and it has addressed coercive economic measures against developing countries.

For example, the GATT Council adopted a panel's report finding that the U.S. cutoff of Nicaragua's sugar import quota in 1983 was a violation of the principle of nondiscrimination, for which the United States had offered no specific justification under the General Agreement. Nicaragua, however, obtained no effective relief since the United States unilaterally imposed a trade embargo in 1985. That embargo was also challenged by Nicaragua in the GATT. However, as discussed earlier, the United States claimed the specific justification of article XXI, which prevented the panel from doing anything more than to offer a general criticism of the embargo and to identify some issues that GATT needed to address.

The further use and expansion of GATT should be encouraged. The ongoing Uruguay round should lead to expanded coverage by GATT over imports, exports, and investment, and should result in improvements in its dispute resolution process and other internal processes. Although dealing with coercive economic measures against developing countries is not the central concern of GATT members at this point, it might be useful to emphasize to the contracting parties the importance of addressing issues raised by the use of economic sanctions. The GATT panel report on the U.S. trade embargo against Nicaragua helped highlight two key issues:

--The need to limit a country's discretion to interpret article XXI. GATT might define the operative terms in the article more precisely and/or allow a GATT panel to consider the appropriateness of a country's invocation of that article.

--The need to consider the adequacy of the relief that might be allowed under article XXIII, particularly when the country imposing an economic sanction limits both imports and exports and thus renders meaningless the target country's withdrawal of its import concessions. Adequacy should also be addressed in the context of a smaller country seeking relief against a much larger country. Should there be some acknowledgement by GATT that relief under article XXIII can entail more than just compensating redress?[53]

B. Substantive questions. Two basic substantive questions are still unresolved when considering how to eliminate or limit the use of coercive economic measures against developing countries. These issues do not immediately arise in GATT since it already has its own framework for analyzing what economic measures are allowable. The questions, however, might arise even

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53 See discussion in text at footnotes 46 and 50 supra.

in GATT in the context of further expanding its consideration of coercive economic measures. The substantive questions will surely arise in any proposals to give responsibility to any other entity to deal with coercive economic measures not be covered in GATT.

1. What should be the criteria for distinguishing between acceptable economic activity and coercive economic measures? The initial issue here is whether (1) there should be an exhaustive list of specific economic measures that are considered coercive and thus improper or (2) there should be a blanket prohibition on economic measures that possibly violate some general standard, but with specific exceptions allowed.

The alternative of a blanket prohibition, with specific exceptions, seems preferable. The other alternative--an exhaustive list of specific prohibited measures--would be very difficult to draft. It would likely be too inclusive, and thus subject to valid objections by many countries, or the list would be overly narrow, and thus not fulfill the original purpose of preventing coercive economic measures against developing countries.

Drafting a blanket prohibition, subject to exceptions, does encounter its own problems. How should the blanket prohibition be phrased? And what are the allowable exceptions?

a. Formulating the prohibition. Various formulations of a blanket prohibition have appeared in treaties and in U.N. declarations and resolutions, as noted above. Clearly, the prohibition should avoid one ambiguity that has appeared in the past by making clear that the prohibition deals with economic measures, not with the use of force.

The most important issue here is: what principle or principles should serve as the determinative basis for prohibiting certain economic measures? As illustrations of what the principles might be, the 1965 Declaration (Resolution 2131) would prohibit economic measures "to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind." Resolution 42/172 of December 1987 would prohibit economic sanctions "incompatible with the provisions of the Charter of the United Nations and in violation of undertakings contracted multilaterally and bilaterally against developing countries as a form of political and economic coercion that affects their economic, political and social development."

Although the exact language might vary, economic measures should be expected to satisfy two essential principles, or be subject to prohibition as coercive economic measures. They are the principle of nondiscrimination as found in the General

Agreement and the principle of consistency with the provisions of the U.N. Charter.

Nondiscrimination provides a key initial test to determine whether a particular country or group of countries might be the target of economic measures. If there is discrimination, then the economic measures are at least suspect. On the other hand, if a sender country decides to institute economic measures generally (e.g., a new trade or tax policy), then the measures are not likely to be coercive economic ones. The principle of nondiscrimination also has the extensive and valuable history of the General Agreement to draw upon in dealing with ambiguities.[54]

Consistency with the provisions of the U.N. Charter--including the principles regarding sovereign equality, political independence, and territorial integrity--provides the basis for considering the intent or purpose behind the economic measures. Some investigation into intent seems necessary to distinguish between measures that are aimed to coerce a target country economically or politically, and measures that are for other purposes, such as for valid national security purposes or to deal with foreign exchange problems.[55]

A problem with the requirement that the economic measures be consistent with the U.N. Charter is, of course, that the requirement is somewhat general and can easily lead to disputes over its meaning. The problem is most likely if a general formulation is used--such as simply prohibiting measures "incompatible with the provisions of the U.N. Charter." More specific elaborations would be helpful. An illustration of measures which might not be allowed is found in the statement provided by UNCTAD in a 1986 U.N. report: "In general, the intent of coercive economic measures is to exert pressure upon a Government, directly or through the discontent of its citizens, in order to obtain changes in the Government's policies or practices, or even to weaken the Government to the point of encouraging its collapse or overthrow."[56]

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[54] It also finds support in the 1974 Declaration on the Establishment of a New International Economic Order, which proclaimed: "The right of every country to adopt the economic and social system that it deems the most appropriate for its own development and not to be subjected to discrimination of any kind as a result." G.A. Res. 3201 (S-VI), para. 4(d) (May 1 1974).

[55] Requiring consistency with the principle of the U.N. Charter overlaps with the approach, discussed below, of allowing exceptions or justification.

[56] A/41//739, para. 20 (Oct. 24, 1986).

Besides formulating the prohibitory principles, should there be some statement of what is meant by "economic measures," even if there is not an exhaustive list? A precise statement of the economic measures covered does not seem important, though some elaboration might be helpful as long as it is properly inclusive. Resolution 42/173 of December 1987 provides a useful starting point with its specifics about "trade restrictions, blockades, embargoes, and other economic sanctions."

One important question here is whether possible coercive economic measures can include affirmative economic activities, as well as negative measures like trade embargoes. The affirmative activities are those where a country is offering a benefit, or "carrot," to the other country to encourage economic or political developments. A prime example would be bilateral foreign aid.

While there might be some debate on this, it does not seem advisable at this point to include affirmative economic activities among the economic measures that are potentially being prohibited. While these activities can have an impact on the receiving country, favorable economic relationships between countries should be encouraged. To delve into, say, the subjective motivation for a grant of foreign aid would "certainly be unworkable and probably counterproductive to the interests of recipient states in obtaining assistance for valid public purposes."[57]

b. Allowable exceptions. What, if any, exceptions or justifications should be allowed, assuming a general prohibition on negative economic measures that are discriminatory and that are inconsistent with the provisions of the U.N. Charter?

Exceptions should be recognized, even though intent is already taken partly into account by the requirements of nondiscrimination and consistency with the U.N. Charter. The language regarding the Charter might well be ambiguous. Moreover, there are a number of exceptions that have been recognized and accepted in the GATT context that should be explicitly recognized here. Otherwise, to leave the language ambiguous would surely create unnecessary questions and increase opposition to a proposed rule against coercive economic measures.

The starting point for recognizing exceptions should, indeed, be those that are accepted in GATT. They are not only explicit, but there also is an extensive history of interpretation. The key exceptions are likely those in article XXI, discussed above, regarding measures taken "in time of war or other emergency in international relations." The article also

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57 Damrosch, supra note 26, at 31.

has exceptions relating to fissionable materials and to traffic in arms.[58]

Mere incorporation of the GATT exceptions is not adequate, though. There is considerable ambiguity regarding the scope of at least the exceptions regarding international emergencies, as highlighted in the GATT dispute over the U.S. trade embargo of Nicaragua. Just as this exception and others need to be clarified in GATT, as recommended earlier, so too should they be clarified in any arrangement beyond GATT.

2. Should the rule against coercive economic measures be the same for all countries, or should there be a special rule to assist developing countries?

In GATT and many other situations, international law recognizes that developing countries are entitled to differential treatment to assist their development. Nevertheless, it is not certain that a special rule need be devised to protect developing countries, as distinct from all countries, from coercive economic measures.

First, in GATT, the principle of nondiscrimination and the allowable exceptions to it (such as in articles XX and XXI) are applicable to developed and developing countries alike. To the extent that GATT is used to help eliminate coercive economic measures, it is not immediately obvious why a special rule for developing countries need be fashioned. If reasons do appear for a special rule, then differential treatment might well be appropriate, as GATT has recognized in other situations in the past.[59]

Second, for cases not covered by GATT,[60] again it is not clear substantively why a general rule (discussed above) that includes prohibitory language and recognized exceptions needs to distinguish between developed and developing countries. If

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58 The general exceptions in article XX would probably cover only a few cases of the type of economic sanctions that this report is concerned with. For example, the provisions allowing measures "necessary to protect public morals" or "relating to the products of prison labor" might be invoked in efforts to help justify sanctions imposed to protest human rights violations or racial discrimination.

59 E.g., GATT article XVIII.

60 As discussed above, these includes cases where the target country is not a GATT member or where the challenged economic activities (e.g., investment, landing rights) are not within the scope of GATT.

reasons do appear for a special rule, then differential treatment might also be appropriate here.

Limited resources do provide one procedural reason for a special rule in the second (or "beyond GATT") case. If an entity is given responsibility for monitoring and reporting on coercive economic measures (and possibly taking further steps), then having it focus initially on such measures against developing countries would be a wise allocation of presumably limited bureaucratic resources. The need to protect and assist the developing countries is presumably greater than helping the developed countries who might be targets.

If it is considered helpful to have a special rule to assist developing countries, then there is the problem of defining which countries are "developing countries." Membership in the Group of 77 should not be determinative since the Group of 77 includes several countries with a very high standard of living. For example, Qatar and the United Arab Emirates have per-capita incomes that probably exceed that of the United States.

GATT has its criteria in article XVIII for designating developing countries which are entitled to take special steps. Article XVIII is available only to two types of contracting parties:

(1) A contracting party "the economy of which can only support low standards of living and is in the early stages of development"; and

(2) A contracting party "the economy of which is in the process of development but which does not come within" (1) above.

GATT apparently does not have a list, however, of which countries satisfy these criteria.[61]

The GATT criteria are not the only ones possible. However, if a special rule is decided upon, it would be necessary to select appropriate criteria and then determine which countries qualify as developing countries.

C. Institutional issues. Even assuming considerable progress in the Uruguay round, GATT will not have jurisdiction to deal with all coercive economic activities. As noted above, GATT will presumably not be involved when the target country is not a GATT member, or in many cases dealing with export controls,

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61 The issue is apparently addressed instead on a case-by-case basis as necessary. See GATT, 6th Supp. BISD 113 (1958) (regarding Ceylon).

financial controls, or bilateral government programs (e.g., landing rights and fishing rights).

These cases should not be left as orphans. Rather, the United Nations should formalize the process for dealing with these cases if it is serious about working to eliminate coercive economic measures against developing countries.

The United Nations, through the General Assembly or Secretary-General,[62] should designate an entity or entities to handle these cases, and define what can and should be done. In some situations, specialized agencies might play a major role when the sanction is in their area of expertise. The most obvious example here is the International Civil Aviation Organization (ICAO), which could investigate a termination of landing rights or other sanctions involving civil aviation.

For the vast majority of cases that GATT does not cover, the General Assembly or Secretary-General should designate one entity to be primarily responsible. This would ensure that there is some consistency in treatment.

Apart from designating an entity (or entities) is the important question of what exactly the entity should be tasked to do. If even minimal progress is to be made toward eliminating coercive economic sanctions against developing countries, the entity should be directed to:

--Investigate any situation where coercive economic measures are being used against a developing country and where GATT might not have jurisdiction. This investigation should commence either in response to a complaint from a target country or on the entity's own initiative.

--Report its factual findings to the General Assembly and the Secretary-General.

In addition, if a framework is to be established for evaluating the appropriateness of various economic activities against developing countries outside the GATT system, then the entity should also be directed to:

--Establish a panel or working group (along the lines of GATT) that assesses whether the questioned economic activities are objectionable under the substantive rules discussed above.

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62 The Security Council is appears unable to do this, given its lack of staff and the existence of the veto of its permanent members. See discussion above at pages 16-17 regarding articles 39 and 41 of the U.N. Charter.

--Direct the panel or working group to make recommendations on what the sender country should do to stop its objectionable activity, and to what relief the target country should be equitably entitled. (This last responsibility is obviously the most controversial, especially any considerations regarding possible relief.)

In sum, in looking to the future, it first seems vital to build upon the existing GATT framework and to seek some improvements there. Moreover, it is necessary to develop a realistic norm of international law regarding the use of coercive economic measures, and then to designate an entity or entities that will seek to develop and apply that norm in cases not covered by GATT.

Appendix A

Proposed Agenda

I. An empirical analysis of coercive economic measures against developing countries

A. Defining and identifying coercive economic measures

--Which economic activities should potentially be covered?

B. Assessing their impact on target countries

--Is the Hufbauer-Schott model appropriate? Should other factors be taken into account?

--Should measurement of the impact of sanctions on the target country take into account offsetting benefits from another country?

C. Assessing their impact on development in general

--Besides the cumulative impact on individual target countries, what is the overall impact on development prospects as a whole? How can it be measured?

II. An analysis of the present state of international law

A. Is it clear that no customary rule of international law has developed yet regarding the use of coercive economic measures? If one has developed, what is it?

B. How adequate is the GATT framework for evaluating whether various economic activities are coercive economic measures or not?

1. Which cases will it cover? Which not?

2. Are the GATT exceptions appropriate?

3. Can the GATT dispute resolution process be relied upon?

4. What improvements in GATT would be helpful? Are they likely to emerge from the Uruguay round?

III. Looking to the future

A. Should the further use and expansion of GATT be encouraged for dealing with coercive economic measures against developing countries? If not, what is the alternative? If so, what are the key reforms that should be sought?

1. Should GATT define article XXI exceptions more carefully? Should GATT allow a panel to consider the appropriateness of a country's invocation of that article?

2. Should GATT be willing to provide more relief than compensating redress under article XXIII?

B. What should be the criteria for distinguishing between acceptable economic activity and coercive economic measures?

1. Should there be a general prohibition against economic coercive measures, subject to certain exceptions? Or, should there be an exhaustive list of economic activities that are coercive?

2. If there should be a general prohibition,

   a. What should be prohibited?

   b. Should the possible economic measures that are covered include affirmative economic activities like bilateral foreign aid?

   c. Should exceptions be allowed? Which ones? Are the GATT exceptions a good starting point?

3. Should the rule against coercive economic measures apply to all countries, or should there be a special rule to protect developing countries?

   --If there is a special rule, which countries should be defined as developing countries?

C. What entity (or entities) other than GATT should have a role in handling possible cases of coercive economic activity? What should be the responsibilities of that entity?

1. Should it be able to investigate the facts and reports its findings?

2. Should it be able to establish panels or working groups that can assess whether challenged activities are coercive economic measures?

3. Should the panels or working groups be allowed to make recommendations for corrective action? For awarding relief?

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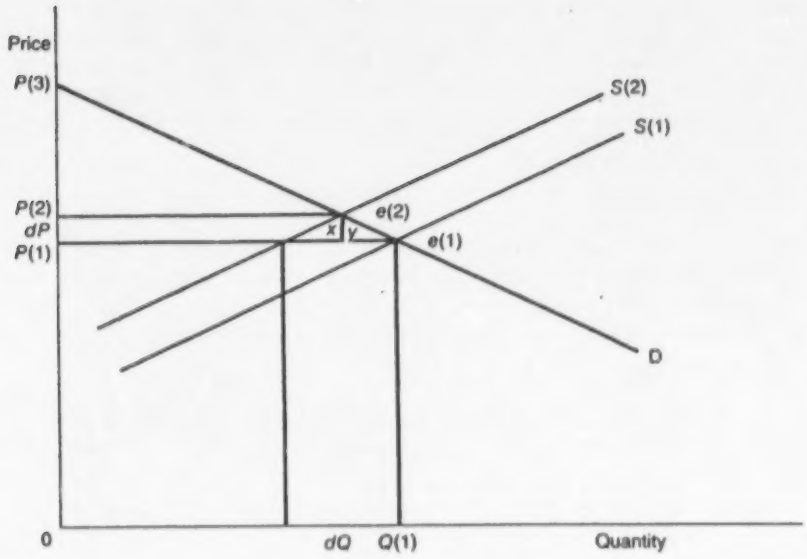
B Estimating the Cost of Sanctions: Methodology

This appendix sets forth the basic analytical model we have used to guide our efforts to estimate the costs of sanctions to both target and sender countries. The following discussion focuses solely on the costs imposed on the target country, but parallel analysis also is relevant for the calculation of the welfare costs to the sender country. Our methodology is illustrated by figure B.1.

In figure B.1, supply and demand curves are shown for a hypothetical good or service (e.g., bank credit) exported from the sender country to the target country. The presanction equilibrium price, $P(1)$, and quantity, $Q(1)$, are shown by the intersection of the supply and demand schedules at $e(1)$. In the first instance, the sender and its allies deprive the target country of supplies in the amount dQ. Since the sender country and its allies are ordinarily not the only suppliers of the good or service, overall supply availability does not decline by the full amount dQ. Instead, the supply curve facing the target country shifts from $S(1)$ to $S(2)$. The horizontal shift from $S(1)$ to $S(2)$ corresponds to the removal of the amount dQ from the pool of supplies available to the target country. Other suppliers, responding to the abandoned market and potentially higher prices, provide an additional quantity indicated by x to the target country. As a result, the net quantity supplied to the target country declines by the amount y. The postsanction equilibrium of price and quantity is $e(2)$; and the post-sanction price is $P(2)$, which is higher than the initial price of $P(1)$ by the amount dP.

How much does the target country lose from this sequence of events? In order to answer that question, we must start with a concept used to describe the gains that purchasers enjoy from engaging in market transactions, namely "consumers' surplus." A word on terminology: the concept of consumers' surplus applies with equal force to spare parts, capital goods, and food. It might better be called "purchasers' surplus" than "consumers' surplus." Consumers' surplus is measured by the difference between the total amount actually paid for the quantity consumed (price times quantity) and the total amount that

Figure B.1 Illustration of welfare loss from the imposition of export sanctions



consumers would hypothetically be willing to pay if the market could be segregated and each consumer were charged his demand schedule price.

In figure B.1, the level of consumers' surplus before the imposition of sanctions is shown by the triangular area bounded by $P(1)$, $P(3)$, and $e(1)$. When sanctions are imposed, and the supply curve shifts from $S(1)$ to $S(2)$, the trapezoidal area bounded by $P(1)$, $P(2)$, $e(1)$, and $e(2)$ is subtracted from the previous level of consumers' surplus. This loss of consumers' surplus represents the cost that export sanctions impose on the target country. By inspection, it is intuitively obvious that the steeper the slope of the demand curve in the neighborhood of the initial equilibrium price (i.e., the more "essential" the item to the target country and the smaller the range of substitute products), and the steeper the slope of the supply curve (i.e., the smaller the range of available alternatives) the greater will be the deprivation experienced by the target country.

The loss of consumers' surplus is customarily referred to as a "welfare loss." The area of the trapezoid representing lost consumers' surplus approximately equals the rectangle denoted by $Q(1)dP$. Hence, as a first approximation, we may write:

(1) $Q(1)dP$ = welfare loss

With the use of some algebra, the change in price, dP, can be expressed in terms of the elasticity of supply, Es, and the elasticity of demand, Ed. The elasticity of supply is defined as the ratio between the percentage change in quantity supplied, to a rough approximation denoted as $x/Q(1)$, and the percentage change in price, denoted as $dP/P(1)$. Similarly, the elasticity of demand is defined as the ratio of the percentage change in quantity demanded, denoted as $y/Q(1)$, and the percentage change in price, denoted as $dP/P(1)$. These elasticities can be represented by the following equations:

(2) $(x/Q(1))/(dP/P(1)) = Es.$

(3) $(y/Q(1))/(dP/(P(1)) = Ed.$

As noted earlier, supply and demand curves that are more steeply sloped in the neighborhood of the initial equilibrium price are characterized by smaller elasticities of supply and demand.

As a further element in our algebraic exercise, we note that:

(4) $x + y = dQ$

We thus have three equations, (2), (3), and (4), and three unknowns, x, y, and dP. By algebraically solving these three equations it can be shown that:

(5) $dP = [P(1)dQ]/[(Ed + Es)(Q(1))]$

Substituting this expression for dP in equation (1), the result follows:

(6) $P(1)dQ/(Ed] + Es) =$ welfare loss.

In equation (6), $P(1)dQ$ represents the face value of the reduction in supply from the sender and its allies, before the price paid by the target country rises and other suppliers partly fill the gap.

To summarize, in this simple construct, the welfare loss inflicted on the target country depends on the size of the initial deprivation, the elasticity of supply, and the elasticity of demand. Table B.1 gives some hypothetical values of demand and supply elasticities and the resulting values of the expression $1/(Es + Ed)$. This expression is, in a sense, the "sanctions multiplier," a number applied to the initial deprivation of supplies experienced by the target country in order to calculate the welfare loss.

By a similar analysis, it can be shown that equation (6) also describes the welfare loss imposed when the sender country closes its markets, and the target country initially loses sales in the amount dQ. In this case, however, the welfare loss represents a reduction in producers' surplus, not consumers' surplus. That is to say, the welfare loss represents a burden on the producers in the target country—a deduction of part of the difference between the market price producers actually receive for the product and the price producers would hypothetically receive if the market could be segregated and each supplier were paid his supply schedule price.

Table B.1 Relation between elasticities of supply and demand and the sanctions multiplier

(Es + Ed)	*1/(Es + Ed)*
0.5	2.00
1.0	1.00
2.0	0.50
4.0	0.25
10.0	0.10

In order to calculate the cost of each sanctions episode to the target country, we first estimate the initial deprivation of markets or supplies, expressed on an annualized basis in current US dollars. We then use our own judgment to estimate the "sanctions multiplier" that should be applied in the context of the particular episode. As a general proposition, we have tried to err on the side of overestimating the appropriate "sanctions multiplier." To illustrate, we apply a multiplier of 1.00 to most reductions in aid, and a multiplier between 0.10 and 0.50 to most reductions in the supply or demand for goods. In a war context, we may apply a multiplier as high as 2.00. The estimates are generous because, in most contexts, the combined supply and demand elasticities would ordinarily exceed 5.0, simply because the target country is likely to be a small factor in world markets. A combined elasticity greater than 5 would correspond to a sanctions multiplier less than 0.2.

SOME KEY ARTICLES OF THE

GENERAL AGREEMENT ON TARIFFS AND TRADE

ARTICLE XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

(c) relating to the importation or exportation of gold or silver;

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

(e) relating to the products of prison labour;

(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;

(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of this Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this subparagraph not later than 30 June 1960.

ARTICLE XXI

Security Exceptions

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

  (i) relating to fissionable materials or the materials from which they are derived;

  (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

  (iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

ARTICLE XXII

Consultation

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.

2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

ARTICLE XXIII

Nullification or Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(a) the failure of another contracting party to carry out its obligations under this Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.